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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 73-218

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INDIANA WAR MEMORIALS COMMISSION,
PETITIONER,

V.

INDIANA CIVIL LIBERTIES UNION, INC.,
RESPONDENT.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

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# BRIEF FOR RESPONDENT IN OPPOSITION

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HENRY J. PRICE, ESQUIRE
1313 MERCHANTS BANK BLDG.
INDIANAPOLIS, INDIANA
ATTORNEY FOR RESPONDENT

AUGUST 28, 1973

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## I.

## ARGUMENT

A. Petitioner's Petition For Writ of Certiorari Is Out of Time.

An opinion was rendered and judgment entered in the present case on February 1, 1973, by the Supreme Court of Indiana. Subsequent thereto a timely Petition for Rehearing was filed by the petitioner. Said petition was denied by the Supreme

Court of Indiana, and an order so entered, on May 2, 1973. (Appendix A to Petition for Writ of Certiorari)

The petition for writ of certiorari was filed on August 1, 1973, more than ninety days after the entry of the order of the Supreme Court of Indiana denying petitioner's Petition for Rehearing. The period for applying for a writ of certiorari has not been extended by a Justice of this Court.

Therefore, it appears that petitioner's application for a writ of certiorari is out of time. 28 U.S.C. §2101(c). Since this time limitation was prescribed by Congress, such untimely filing of a petition is a jurisdictional defect which precludes this Court from waiving the untimeliness or entertaining the petition. It follows that the petition should be denied for want of jurisdiction. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942).

B. This Court Will Not Review State Court Judgments Based Upon Adequate and Independent Non-federal Grounds.

The principal argument advanced by the petitioner as a reason why the writ should be granted may be stated as follows: The Supreme Court of Indiana cannot rest its judgment upon state law, thereby depriving this Court of appellate jurisdiction, since violation of a federal right was asserted before the state courts; therefore, this Court can and should review the judgment of the Supreme Court of Indiana despite the fact that that judgment was based solely upon state law. This argument is totally without merit.

Exactly the same argument was propounded in Wood v. Chesborough, 228 U.S. 672 (1913). Plaintiffs in that case argued that, because they had consistently pleaded constitutional immunities, the jurisdiction of this Court could not be ousted by the action

of the state court in refusing to consider such federal questions and reaching its decision on the basis of local law. They further contended that "if the pleadings or proceedings in the state court present or disclose the assertion of a Federal right . . . this court has jurisdiction to review the decision of the state court, even though that decision is based entirely upon the questions of local law . . ." 228 U.S. at 677. This Court rejected that argument, saying:

> . . . it is well established that if there be Federal and non-Federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court. 228 U.S. at 677.

The Wood case, supra, clearly establishes that petitioner's argument is refuted, and this Court must deny review, if the judgment of the Supreme Court of Indiana was based upon adequate and independent non-federal grounds. As noted in

Wood, this Court has consistently adhered to the self-imposed principle that it will not review state court judgments based upon adequate and independent state grounds. See, also, Murdock v. Memphis, 20 Wall. 590, 636 (1875); Berea College v. Kentucky, 211 U.S. 45 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); and cases cited therein. This important limitation on this Court's review of state court judgments was summarized by Mr. Justice Jackson:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. Herb v.

Pitcairn, 324 U.S. 117, 125-126 (1945).

Thus, it remains only for this Court to consider two questions: (1) Is the judgment of the Supreme Court of Indiana based upon a non-federal ground? and (2) Is that non-federal ground adequate to support the judgment? If the answers to both these questions are affirmative, this Court should decline review.

There is no question that the judgment of the Supreme Court of Indiana in the present case was based upon Indiana law. The specific holding of that court was that "The Commission was . . . arbitrary in its action of denying the ICLU use of the auditorium amounting to a denial of equal protection under Art. 1 §23 of the Constitution of Indiana." 291 N.E.2d at 890. This is admitted by the petitioner, who, at several points in its petition, notes that the Supreme Court of Indiana based its

unanimous opinion on the state constitution and failed to pass upon the federal constitutional questions before it. (Petition, pp. 6, 7, 8)

"Where the decision of the state court is based solely upon a non-federal ground, but the federal question was properly asserted, the Supreme Court will determine whether the non-federal ground independently and adequately supports the judgment." Stern & Gressman, Supreme Court Practice, 134 (4th ed., 1969). This Court made such a determination in Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965). The Supreme Court of Indiana had invalidated a city zoning ordinance which was challenged on the grounds that it violated the just compensation requirement of the state constitution as well as the Due Process Clause of the Fourteenth Amendment. In its opinion the Supreme Court of Indiana did not analyze separately the effect of the two

provisions but considered them together; nowhere in the opinion was it suggested that the conclusions reached by the court flowed from the federal rather than the state source. This Court held that even under such circumstances, there was an adequate and independent non-federal basis for the judgment of the highest state court, saying:

> . . . even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. 379 U.S. at 491-492.

If, under such circumstances, it may be said that a non-federal ground independently and adequately supported the judgment, it follows ipso facto that where a judgment for the plaintiff, such as that in the present case, is explicitly based solely upon a state constitutional provision, there is

an adequate and independent state ground as well.

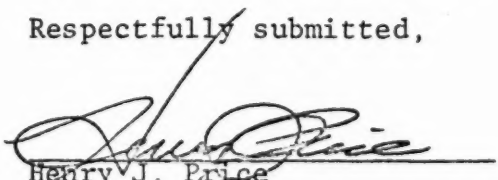
Therefore, it would appear that the judgment of the Supreme Court of Indiana was based upon a non-federal ground and that that ground was adequate to support the judgment. It follows that the petition should be denied for want of a substantial federal question.

## II.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,



Henry J. Price
Counsel for Respondent

August 28, 1973

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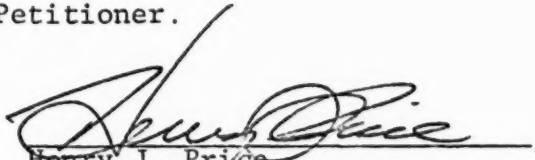
V.

INDIANA CIVIL LIBERTIES UNION, INC.,
RESPONDENT.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1973, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to Theodore L. Sendak, Esq., 219 State House, Indianapolis, Indiana, Counsel for Petitioner.



Henry J. Price
1313 Merchants Bank Building
Indianapolis, Indiana
Attorney for Respondent